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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 172

WILLIAM PEITZMAN (now William A. Riley) and ETHEL PEITZMAN (now Ethel H. Riley), Doing Business as U. S. ELEVATED TANK MAINTENANCE COMPANY,
Petitioners,

v.

CITY OF ILLMO, a Municipal Corporation,
Respondent.

## PETITION FOR REHEARING.

## BRIEF IN SUPPORT THEREOF.

RUSH H. LIMBAUGH,
Cape Girardeau, Missouri,

[redacted]

WHITWORTH STOKES,
Nashville, Tennessee,

Attorneys for Petitioners.

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**Petitioners,**

**v.**

**CITY OF ILLMO, a Municipal Corporation,**
**Respondent.**

## PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Your petitioners most respectfully ask the Court to rehear this cause upon the petition for certiorari heretofore filed in the case to the end that the opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit (141 F. 2d 956) may be corrected and a proper interpretation given to Rule 37d of the Federal Rules of Civil Procedure.

In this petition we will not seek to reargue matters which have been covered in the petitions for cer-

tiorari; some incidental reference or argument of these propositions will be necessary, but no extensive discussion will be made.

This petition is addressed solely to the interpretation of Rule 37d, 28 USCA, foll. 723, made by the District Court and affirmed by the Circuit Court of Appeals.

**PETITIONERS' INSISTENCE**

Rule 37d provides inter alia that if a party or managing agent or director fail to appear before an officer for the purpose of giving his deposition, after being served with a proper notice to so appear, that upon motion the court may strike all or any part of that party's pleadings or enter default against him.

Petitioners here, defendants below, were sued in the state court of Missouri for damages allegedly done to a municipal water tank belonging to the City of Illmo. While the case was pending in the state court, the deposition of petitioner, William Peitzman, was taken by the plaintiff. Thereafter the case was removed by petitioners to the United States District Court, and while there pending counsel for respondent served upon counsel for petitioners certain notices to take depositions, which notices were substantially as reproduced below:

[fol. 86] Notice to Take Depositions and to Produce Witnesses and Documents.

To the above-named Defendants: Pursuant to Rules 26 and 30 of Federal Rules of Civil Procedure, you are hereby notified that depositions upon oral examination of witnesses, whose names and addresses (so far as known to plaintiff and its attorneys and agents) are as hereinafter set out, will be taken on behalf of Plaintiff in the above entitled cause at and in Room 308 of Shelby County Courthouse, at Adams Avenue and North Second Street, the same being the Deposition Room of the Chancery Court of Shelby County, Tennessee, in the City of Memphis, County of Shelby, and State of Tennessee, before Henry S. Waldauer, Notary Public and Public Shorthand Reporter, on April 10th, 1942, between the hours of 9:00 A.M.

and 5:00 P.M. of that day; that the taking of said depositions, if not completed on that day, will be continued from day to day between the same hours and at the same place until completed; and that the names and addresses of witnesses whose depositions Plaintiff will take at such time and place are as follows:

1. William Peitzman: (Defendant) Business address, 1080 Union Avenue, Memphis, Tennessee. Residence, 1205 Parkway, Memphis, Tennessee.

2. Ethel Hester Peitzman: (Defendant) Business address, 1080 Union Avenue, Memphis, Tennessee. Residence, 1205 Parkway, Memphis, Tennessee.

[fol. 87] 3. William Peitzman, Jr.: (Employee and son of Defendants) Business address, 1080 Union Avenue, Memphis, Tennessee. Residence, 1205 Parkway, Memphis, Tennessee.

4. Miss Tommie Henry: (Employee of Defendants) Business address, 1080 Union Avenue, Memphis, Tennessee. Residence, unknown.

5. Miss Dorothy Rossett: (Employee of Defendants) Business address, 1080 Union Avenue, Memphis, Tennessee. Residence, unknown.

6. And all other persons who are employees of the Defendants and who work or live in the City of Memphis (whose true names are unknown at this time to this plaintiff and its agents, servants, and attorneys).

7. Margaret Abernathy: Residence, 1605 Waverly Street, Memphis, Tennessee.

8. William H. Gotchell: Bookkeeper at Union Planters Bank, Memphis, Tennessee. Residence, unknown.

9. O. K. Erp: Vice-President of Union Planters Bank, Memphis, Tennessee. Residence, unknown.

10. Joe S. Hicks: City Assessor, Room 114, Courthouse, Memphis, Tennessee. Residence, unknown.

11. K. L. Nazor, County Assessor, Room 106, Courthouse, Memphis, Tennessee. Residence, unknown.

12. Sam D. Campbell: Register of Deeds, Recorder's Office, Memphis, Tennessee. Residence, unknown.

13. Miss Annie Bondurant: Deputy Register of Deeds, Recorder's Office, Courthouse, Memphis, Tennessee. Residence, unknown.

14. W. J. Martin: Keeper of Licenses and Privileges Office, Room 202, Courthouse, Memphis, Tennessee. Residence, unknown.

You are further herewith notified to be and appear, without subpoena or further notice, at the time and place given, and to have all your employees, at and in the City of Memphis (whether or not hereinabove named) in attendance at such time and place, for the taking of your and their depositions.

You are further herewith notified to have and produce in evidence at such time and place and for the inspection of the Plaintiff and its attorneys and agents, the following books, records, documents, papers, instruments, and writings, belonging to you or in your custody and control, namely:

a. All ledgers, journals, account books, cash books, and other books showing receipts of moneys or disbursements of moneys from January 1st, 1937, to the date of receipt of this notice, by you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by either of them, or by any other company operated by you or either of you under any and every name whatsoever.

b. All stubs of checkbooks, canceled checks, bank balance sheets, and all other written papers of or pertaining to any bank transaction from January 1st, 1937, to the date of receipt

of this notice by you or either of you or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by either of them or by any other company operated by you or either of you under any and every name whatsoever.

c. All Social Security records and forms and copies thereof from the effective day of the Social Security Act and all papers or writings and records of any sort whatsoever, showing employment of persons from January 1st, 1937, to the date of receipt of this notice, by you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by either of them or by any other company operated by you or either of you under any and every name whatsoever.

d. All records, writings, books, or other papers and instruments, and copies thereof, showing Workmen's Compensation records from January 1st, 1937, to date of receipt of this notice, held by you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by any other company operated by you or either of you, under any and every name whatsoever.

e. All records, carbon copies, or other instruments of writings, of or pertaining to any Income Tax Returns or transactions, either with the State or the Federal Government, from January 1st, 1937, to the date of this notice made or kept [——] you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by any company operated by you or either of you, under any and every name whatsoever.

f. All leases, copies, rental contracts, copies of rental contracts, correspondence with lessors and copies thereof, of or pertaining to any real estate or office rooms leased or rented by you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or by either of them, or by any other company operated by you or either of you under any and every name whatsoever, from January 1st, 1937, to the date of receipt of this notice.

g. All letters, copies of letters, telegrams, copies of telegrams, and all other correspondence of any and all kinds whatsoever made or kept by you or either of you, or by any of your employees, or made and kept under your direction, or made and kept by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or any company operated by you or either of you under any and every name whatsoever, since January 1st, 1937, to the date of receipt of this notice.

h. All letters, copies of letters, telegrams, copies of telegrams, communications and correspondence of any and all kinds whatsoever, had by you or either of you, or by your employees, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or any company operated by you or either of you under any and every name whatsoever, with E. B. Wilson, ..... and ..... Hinchman, from January 1st, 1937, to the date of receipt of this notice, with E. B. Wilson or any other of your [salesman], field men, contact men, or other employees who were out on the job of constructing and repairing tanks or of soliciting cities and towns to permit your company to repair their water tanks.

i. All copies of and all original Work Sheet Reports, Daily Work Sheet Reports, and other reports of work and labor done by employees of you or either of you, or of Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or any company operated by you or either of you under any and every name whatsoever, in repairing elevated water tanks, between January 1st, 1937, to the date of receipt of this notice.

j. All original Certificates of Title, title to motor vehicles, registration certificates, or all other writings pertaining to official record by the State of Tennessee or by any other State in the United States of any motor vehicle owned by you or either of you, or by Midstate Steeple Jack Construction Company, U. S. Elevated Tank Maintenance Company, Dixie Tank and Bridge Company, or any company operated by you or either of you, under any and every name whatsoever, since January 1st, 1937, to the date of receipt of this notice.

k. All corporate charters, articles of association, by-laws, minute books, records of stockholders' meetings, records of boards of directors' meeting and copies thereof, in which you or either of you have been an officer or stockholder from January 1st, 1937, to the date of receipt of this notice.

l. All articles of agreement to any partnership, copartnership, association, or joint enterprise, and copies thereof, in which you or either of you have been interested between January 1st, 1937, and the date of receipt of this notice.

Pursuant to Federal Rules of Civil Procedure governing the taking of depositions, Defendants are hereby notified:

1. That depositions, upon oral examination of witnesses, will be taken on behalf of Plaintiff in the above entitled cause on the date and at the places as hereinafter set out.

2. That all witnesses whose depositions will be taken, unless otherwise specifically indicated, reside in the city where such witness' deposition is taken, in so far as Plaintiff knows; and where the name and street address of any witness is known to Plaintiff, such name and street address are set out following the name of said city wherein such particular depositions will be taken.

3. That in each instance, if the defendants voluntarily appear, their depositions will also be taken.

4. That in each instance where depositions are taken (except in the depositions that will be taken in Memphis, Tennessee, Nashville, Tennessee, Springfield, Illinois, Pana, Illinois, Chicago, Illinois, [Bensonville], Illinois, Ann Arbor, Michigan, Lansing, Michigan, Ypsilanti, Michigan, Kansas City, Missouri, Jefferson City, Missouri, Little Rock, Arkansas, Jacksonville, Illinois, Fort Deposit, Alabama, and Birmingham, Alabama), the depositions will be taken

a. of all officials and employees of the city of which such depositions are taken who were such officials and employees at the time defendants or either of them had any business dealings with such city, and

b. of such present city officials or employees who have any knowledge or information thereof or have custody of any records pertaining thereto, and, also

c. of the clerk, the sheriff, and the judge of any court wherein any legal proceedings were had in which defendants or either of them were parties concerning any matter pertaining to the work of them or either of them on such water tank, and, also

d. of any other persons having knowledge of any matter pertaining to such work on such water tank, and, also

e. of any person having knowledge of the reputation of defendants or either of them for the traits of truth, veracity, honesty, fair-dealing, or of being a common cheat, a saboteur, or other malicious and corrupt character, and, also

f. of any person having knowledge of any prosecution of defendants or either of them for the violation of the ordinances of such city or the criminal laws of the state wherein such city is located.

5. That in the cities of Memphis, Tennessee, Nashville, Tennessee, Springfield, Illinois, Pana, Illinois, Chicago, Illinois, [Bensonville], Illinois, Ann Arbor, Michigan, Lansing, Michigan, Ypsilanti, Michigan, Kansas City, Missouri, Jefferson City, Missouri, Little Rock, Arkansas, Jacksonville, Illinois, Fort Deposit, Alabama, and Birmingham, Alabama, the names of the witnesses, in so far as they are known to Plaintiff, are set out following the naming of such cities respectively, but in each city in this paragraph named, the deposition of any other person, whether or not hereinabove or hereinafter named, and whose names are now to Plaintiff unknown and who shall have knowledge of the matter in controversy between the Plaintiff and the Defendants, or who shall have knowledge of the matters inquired into in such respective cities, will be taken by the Plaintiff on such oral depositions.

6. That the dates for the taking of depositions in the various cities, the name of each such city, the place therein where such depositions will be taken, and the names and addresses of the witnesses, in so far as known to Plaintiff, are respectively as follows:

Inverness (Florida)

July . . , 1942; At the City of Inverness, Florida; In the office of the City Clerk. The known witnesses are:

J. H. Spivey, City Clerk
M. C. Scofield, Mayor
Frank Morris, Superintendent of Waterworks
George W. Scofield, City Attorney
W. H. Deamen
E. S. Sasser
James E. Connor
Joe S. Savary
Coy Conrad
Bary Windish
Otto Allen
Frank D. Sanders

(Then follows a list of forty-six other cities with the same statement as the sample of Inverness, Florida.)

No subpoena or order of court was ever served and no notice was ever served upon petitioners. Petitioners did not appear at the time and place designated in the notices. Respondent thereupon proceeded to take numerous depositions over the eastern, southern, and midwestern United States and succeeded in se-

curing all the evidence which it deemed necessary to make out its case.

After securing all evidence sufficient to try its case, the respondent moved for a default judgment. The District Court granted the motion, struck out petitioners' pleadings, and entered default judgment against them.

We believe there are two fundamental errors in this action of the District Court and we doubt that the Circuit Court of Appeals considered the far-reaching effect of its opinion in affirming this action of the trial court.

The first error apparent is that the District Court construed the words "proper notice" contained in Rule 37d as meaning a mere notice written out by counsel and served upon opposing counsel, when from time immemorial a proper notice to appear and give testimony has been a subpoena or an order of court served upon the person commanded to appear.

The second error apparent is that the District Court used the sanctions of the rule as a punishment for contempt and not as a means of securing evidence or as a procedural device to expedite the trial of the case.

Rule 37d finds its analogy in the New York Civil Practice Act, Secs. 286 et seq. (particularly 290, 299), and this act nor any other practice act discovered by counsel affords an oral examination of a defendant upon mere notice between attorneys for the parties. cf. Forsthoffer v. Netherland Cab Co. (1940), 24 N. Y. S. (2d) 877, 175 Misc. 660.

It is true that there are to be found in the New York reports two cases containing obiter dicta to the effect that a party's pleadings may be stricken out and judgment entered against him, if he fails to appear for oral examination by deposition upon notice from his adversary's attorney; and it is true that some United States District Courts have, with like obiter dicta, used language to the same effect referring to Rule 37 (d), R. C. P. But the fact remains that **not one** of these courts has ever undertaken to **enforce** any such **supposed rule**; and there is no doubt about the fact that a **defendant** in New York cannot be subjected to **any such sanctions**, regardless of whether or not he willfully and wholly ignores any such notice. The enunciated obiter dicta referred to above is contained in the following cases, none of which undertakes to apply the rule they state, to wit:

Kirman v. Fries (1927), 220 N. Y. S. 430, 128 Misc. 861;
Nederlansche Petroleum on Asphalt Maatschappij v. Interocean Oil Co. (1924), 203 N. Y. S. 45, 208 Ap. Div. 107;
Spaeth v. Varner Bros. Pictures Corp., 1 F. R. D. 729 (S. D., N. Y.);
Madison v. Cobb, 29 F. Sup. 881 (M. D., Penna.);
Cohn v. Annunziata, 27 F. Sup. 805 (D. C., N. Y.);
Millinocket Theater v. Kurson, 35 F. Sup. 754 (D. C., Me.);
Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Sup. 303 (D. C., N. Y.).

The judgment here is the first reported case in the entire history of American or English jurisprudence (discoverable by petitioners) in which a defendant's answer has been stricken and judgment by default entered against him for his failure to attend in re-

sponse to a mere notice from opposing counsel that his deposition would be taken.

The Rules of Civil Procedure constitute a logical system; the various sections thereof and pari materia; and must be so construed. Those courts which have inferred obiter dicta that the words "served with a proper notice" in Rule 37 (d) dispense with the necessity for serving an order of court or a subpoena to procure the attendance of an adverse party for oral examination before trial do so erroneously by treating Rules 5 (b) and 30 (a) alone as being in pari materia with these words in Rule 37 (d), wholly ignoring Rules 26 (a, b), 34, 37 (a, b), and 45 (a-f, incl.), R. C. P., and 28 U. S. Code 601, 646-648, 652, which are obviously the provisions referred to by the words "served with a proper notice."

The words "willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice," in Rule 37 (d), R. C. P., do not define "service" or what is "a proper notice," and do not purport per se to abolish or alter any right, privilege or immunity of a party-witness under any other rule, not to create any new writ, process or obligation. And they do not do so. The **manifest** function, and the **sole function**, of Rule 37 (d) was to create a presumption of fact arising from a specific breach by a party of his **legal duties and obligations imposed by other rules and laws.** The object of Rule 37 (d) was to meet the need recognized in Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. ed. 530, 15 Ann. Cas. 645. Neither expressly, nor by reasonable inference, does it go further and dispense with the necessity for the service of an **order of court** or **subpoena** upon an

adversary party whose oral examination before trial is desired.

Rule 5 (a, b) R. C. P. permits service of an order of court on a party's attorney, but not service of a subpoena for the party. Rule 30 (a) regulates the service of "notice of taking a deposition" generally. Rule 37 (d) creates a presumption when a party willfully ignores "a proper notice to appear" as a witness. None of these rules intimates that a mere "notice of the taking of depositions" shall fulfill the requirements of "a proper notice to appear" as a witness; and Rules 30 (a) and 37 (d) manifestly have nothing in common, since a "notice of taking depositions" is not "a proper notice to compel attendance" of a witness.

See Rules 30 (g) (1, 2), 45 (c), R. C. P.;
70 C. J. 44, Witnesses, Sec. 23;
27 C. J. S. 83-86, Discovery, Sec. 53, N. 47;
6 Encyc., Plead. & Pr., p. 814.

A party is not required, directly or indirectly, to produce any documentary evidence at his oral examination by his adversary **before trial,** without a previous order of court therefor; and he is not subject to sanctions if he fails or refuses to do so.

Rules 34, 45 (d) (1), R. C. P.;
U. S. v. Aluminum Co. of America, 26 F. Sup. 711 (D. C.-N. Y.);
F. T. C. v. Amer. Tob. Co., 264 U. S. 298, 44 S. Ct. 336, 68 S. ed. 696, 32 A. L. R. 786;
Kenealy v. Texas Co., 29 F. Sup. 502 (D. C.-N. Y.);
People ex rel. Lemon v. Sup. Ct., 245 N. Y. 24, 156 N. E., 84, 52 A. L. R. 200;
Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. ed. 530, 15 Ann. Cas. 645.

The production of documents called for by the notices served by plaintiff's attorney in this case was unreasonable, oppressive, and unlawful; and was wholly contrary to the Rules of Civil Procedure.

Rule 26 (b), 34, 45 (a, b), 45 (d) (1), R. C. P.;
Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652;
U. S. v. Aluminum Co. of America, 26 F. Sup. 711 (D. C.-N. Y.);
F. T. C. v. American Tob. Co., and Peo. v. Sup. Ct., supra, Under Point No. 8.

As to the second error in the conclusion of the lower courts, this has been thoroughly briefed and argued in the petition for certiorari; however, we do wish to again point out certain features of the matter which we think conclusively demonstrate the soundness of our position.

Judgments by default for failure to answer a complaint, and judgments by default for failure to appear for oral examination by the opposite party, are **each** predicated upon a legal **presumption of fact,** to wit, that the allegations in the adversary's pleading are true, or that defenses thereto are waived. Such judgments are not, and the latter cannot, be **lawfully** predicated upon any theory of **contempt of court.**

Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215;
Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645;
34 C. J. 148, 169, 172-174, Judgments, Secs. 350, 381, 385, 386.

Consequently, District Judge Moore erred in ad-

mitting, hearing, or considering for any purpose, in connection with the motion to strike appellants' pleadings and to enter default judgment against them, evidence from which he concluded that petitioner William Peitzman had been guilty of perjury, contumely or refusal to answer questions during the taking of his deposition by the respondent for use in the state court on July 26, 1941 (before the removal to the federal court), because:

(1) Petitioner Peitzman's asserted actions were not a contempt of the federal court; (2) the state court had already dismissed on demurrer the plaintiff's petition against him based on such so-called perjury, contumely and refusal to answer, and this should have concluded the matter in so far as the federal court was concerned; (3) respondent Peitzman's actions constituted at most a "contempt," and not a "failure to appear," under the federal rules; (4) contempt is not punishable under Rule 37 (d), which was the rule invoked by the plaintiff's motion; and (5) a party's "failure to appear" under Rule 37 (d) and his "contempt" for perjury, contumely and refusal to answer after appearing, involve different acts, different rules, different proceedings, different grounds, and different legal consequences wholly unrelated under the federal rules.

Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501 (C. C.-Wis.);
17 C. J. S. 65, Contempt, Sec. 51;
Hammond Pack. Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645;
Rules 37 (a), (b), (d), 45 (f), 53 (d), (2), 70, R. C. P.

In addition to the foregoing and as conclusively shown by the petition for certiorari respondent already

had obtained all evidence which it wished or considered necessary to the preparation of its case before applying for a default judgment. This action runs squarely counter to the opinion in the Hammond Packing Company case. This action is nothing except punishment for past misconduct—i. e., sanctions for contempt. And as demonstrated under the first error above discussed petitioners were served with no process of the court, but merely with a paper prepared by opposing counsel and served upon their counsel, thus the sanctions are applied because they were in contempt of opposing counsel.

**CONCLUSION**

Petitioners respectfully ask that this court rehear this case so that an important matter of federal procedure may be correctly decided and so that they may be given an opportunity to have their day in court to present their defenses upon the merits of this case.

Respectfully submitted,

Whitworth Stokes

Certificate of Counsel:

Whitworth Stokes certifies that he is one of the counsel for petitioner in the above petition and that this petition is presented in good faith and not for delay.

This, November 2, 1944.

Whitworth Stokes

535 Third National Bank Bldg.,
Nashville, Tennessee,
Counsel for Petitioners.